IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/12/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CIVIL REVISION PETITION (P.D.)No.1009 OF 2003
AND
C.M.P.No.6696 OF 2003.

Chinnan ... Petitioner

-Vs-

Marappan ... Respondent

Civil Revision Petition filed under Section 115 of the Code of Civil Procedure for the relief as stated therein.

!For petitioner : Mr.K.Sekar
for M/s.Sarvabhauman
Associates

^For respondent : Mr.N.Manoharan

:O R D E R
The above Civil Revision Petition has been filed under Section 115 of the Code of Civil Procedure praying to set aside the fair and decretal order dated 21.3.2003 made in I.A.No.145 of 2003 in O.S.No.96 of 2002 by the Court of District Munsif, Paramathi.

2. On a perusal of the materials placed on record and upon hearing the learned counsel for both, it comes to be known that the petitioner herein has filed the suit in O.S.No.96 of 2002 before the Court below as against the respondent herein for declaration that he has right to take men, cattle, carts and other vehicles through the suit pathway to reach his property and consequential mandatory injunction to restore a portion of the pathway which was obliterated by the respondent/defendant and for permanent injunction. When the said suit was pending, the respondent/defendant filed a petition in I.A.No.145 of 2003 under Order 26 Rule 9 CPC praying to appoint an AdvocateCommissioner to note down the physical features of the suit property.

3. A Counter was filed before the Court below by the petitioner thereby submitting that the respondent had already filed a suit in O.S. No.33 of 2002 before the same Court as against the petitioner herein for

permanent injunction; that in the said suit, the main issue between the parties is whether the petitioner is entitled to use X2, X3 portion (which is the subject matter in the present suit) of the pathway as cart track or not and in the said suit, the petitioner as the defendant therein filed an application in I.A.No.220 of 2002 to appoint an Advocate-Commissioner and the Commissioner also submitted his report and plan and based on the advocate-Commissioner's report and plan filed therein, the present suit was filed by the petitioner; that without disclosing the said fact of an Advocate-Commissioner having already been appointed and filed the report, the present petition filed by the respondent/defendant without asking for scraping of the earlier report is not sustainable.

4. Based on the above pleadings, the Court below would conduct an enquiry wherein no oral or documentary evidence was adduced on either side and in consideration of the facts and circumstances of the case, would hold that no document was produced to prove that both suits are connected to each other and the properties are the same and to determine the dispute and that the appointment of an AdvocateCommissioner is a must. On such reasons, the Court below would ultimately allow the petition filed by the respondent herein for appointment of the Advocate-Commissioner. Aggrieved, the petitioner/plaintiff has come forward to file the above civil revision petition on certain grounds such as (i)that the learned District Munsif has failed to comprehend the ambit and scope of Order 26 Rule 9 CPC, which has resulted in miscarriage of justice; (ii) that the learned District Munsif has failed to see that with respect to the same property, already the AdvocateCommissioner has visited the suit property and filed his report and plan in the connected suit in O.S.No.33 of 2002 and hence nothing remains to be elicited by the advocate-Commissioner; (iii) that the learned District Munsif has failed to consider the cause of action alleged in the present suit and it is appropriate to mention that only since the respondent/defendant obliterated a portion of the suit pathway and filed the connected suit in O.S.No.33 of 2002, the present suit was filed; (iv) that the learned District Munsif has failed to see that the appointment of an Advocate-Commissioner is totally unnecessary and further more, the present suit and the suit in O.S.No.33 of 2002 have got to be tried together which would mean that one Commissioner's report and plan would be suffice to decide the issue in controversy.

5. During arguments, the learned counsel for both would only reiterate what materials have been brought forth in the application filed for the appointment of the Commission and the counter filed therein and the pleadings of the above civil revision petition with no new fact or circumstance having been brought forth nor any law pleaded and therefore tracing the arguments of the learned counsel would only be a wasteful exercise and hence this Court is left with no choice but to decide the above civil revision petition on merits and in accordance with law in full consideration of the materia ls placed on record before it.

6. There is no denying of the fact that the respondent herein has already filed O.S.No.33 of 2002 and the petitioner has filed the present suit in O.S.Nos.96 of 2002 regarding the same suit properties before the same

Court i.e. the Court of District Munsif, Paramathi. Further, there is no denying of the fact on the part of the lower Court that in the earlier suit, an Advocate-Commissioner was appointed in I.A.No.220 of 2002 in O.S.No.33 of 2002 for noting down the physical features of one and the same property, which are the subject matters in both the suits and the Commissioner also seems to have inspected the place and filed his report in the earlier suit. In these circumstances, it is the case of the petitioner that the appointment of a Commission in the present suit, as it has been done by the lower Court, is unnecessary and is an unwarranted exercise and therefore would stiffly oppose the order passed by the lower Court appointing a Commission on the application of the petitioner in I.A.No.145 of 2003 in O.S.No.96 of 2002.

7. For consideration of the implications of the appointment of the Commission in both the suits, the orders passed thereon by the same lower Court and to have a comparative study, no proper materials, particularly pertaining to the appointment of the Commission in the earlier suit in O.S.No.33 of 2002, have been placed before this Court and therefore based on the admitted facts, if a decision has to be arrived at by this Court, it should be pointed out that no proper reason has been assigned on the part of the lower Court and the one assigned to the effect that no document was produced to prove that both suits are connected to each other and the properties are one and the same so as to determine the dispute, is untenable and unsustainable in law particularly in view of the fact that both the matters are very well pending before the same Court. Even if no sufficient materials have been placed before the Court by either of the parties, it is the bounden duty of the Court to have a judicial notice of those facts, which have been lying at the hands of the lower Court and passing an order appointing a new commission in the present suit without having a mind to go into the facts which are very well available with the lower Court itself is nothing short of an act revealing the utter irresponsibility on the part of the Court below and therefore the appointment of a Commission in the new suit for noting the physical features and to file a report is not only luxurious but erroneous as well. It would only depict the utter carelessness and slipshod manner in which the lower Court has dealt with the subject unmindful of the warranting situation where the trial Court is expected to rise to the occasion in verifying all the connected records which is highly deplorable and discredited. The appointment of the Commission by the lower Court is nothing but an erroneous order and hence it becomes only liable to be set aside.
In result,
(i)the above civil revision petition succeeds and is allowed.
(ii)The fair and decretal order dated 21.3.2003 made in I.A.No.145 of 2003 in O.S.No.96 of 2002 by the Court of District Munsif, Paramathi is hereby set aside.
(iii)The trial Court is directed to go into the records very well made available with it and process the earlier commission appointed by itself in O.S.No.33 of 2002 on its own file thus taking judicial notice of the same and to proceed further at the earliest.

However, in the circumstances of the case, there shall be no order as to costs.

Consequently, C.M.P.No.6696 of 2003 is closed.

Index: Yes
Internet: Yes

Rao

To

The District Munsif,
Paramathi.